Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

B. MICHAEL SCHNEIDER,
Plaintiff-Petitioner

v.

THE RYLAND GROUP
Defendant- Respondent

On Petition for Writ of Certiorari to the Supreme Court of Illinois

---

PETITION FOR WRIT OF CERTIORARI

B. Michael Schneider
126 Inner Ct.
New Lenox, Il. 60451
815/546-3616

QUESTIONS PRESENTED

1. Plaintiff's breach of contract claim was involuntarily dismissed by the circuit court based on a finding that the document upon which the complaint was based was a written brokerage agreement that required an automatic expiration date. In 1996 when the document was executed, Illinois law only required written listing contracts between a broker and a seller to have an automatic expiration date. Ryland is the buyer of the property not the seller. The law was changed (3) years after the document was executed by Ryland to include written buyer's brokerage agreements. Was the trial court precluded from applying legal definitions and law enacted years after the contract was executed as it conflicts with this Court's decision?

2. Illinois law prohibits a presiding judge from deciding issues of disputed material facts when a jury demand exists. The 7th Amendment also provides a right to a jury trial on disputed issues of material fact. Is Plaintiff's breach of contract action protected by the 7th Amendment to the U.S. Constitution thus precluding the trial judge from dismissing the breach of contract claim?

PARTIES TO THE PROCEEDING

Petitioner is B. Michael Schneider, sui juris, and a resident of the State of Illinois.

Respondent, The Ryland Group, is the parent company of Ryland Homes. It is a publicly traded company listed on the New York Stock Exchange withits corporate headquarters in Calabasas, Ca. It maintains a regional office in Illinois.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, B. Michael Schneider, respectfully petitions for writ of certiorari to review an involuntary dismissal order from the Circuit Court of Cook Co., Il.

OPINIONS BELOW

No opinion was issued but for the order of the Circuit Court (5 pages) and the Appellate Court (18 pages) order affirming the lower court. The Illinois Supreme Court did not give any reason for denial of the Petition for Certiorari.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. 1257 (a) as Plaintiff had objected to the circuit court's determination of an issue of disputed material fact because of the jury demand. Plaintiff focused on this right to trial by jury in the appellate court and the Illinois Supreme Court but, no court has given way to the right.

The Circuit Court docketed its order of involuntary dismissal on August 28, 2006.

The Appellate Court entered its order affirming the circuit court on May 1, 2008.

The Illinois Supreme Court entered its order denying the Petition to Appeal as of Right and Leave to Appeal on September 24, 2008.

Chief Justice Stevens extended the time to file a Petition for Writ of Certiorari to and including February 21, 2009 on December 1, 2008.

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment VII
Illinois Constitution Article I Section 2
Illinois Constitution Article I Section 12
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735 ILCS 5/2-615 Involuntary Dismissal (Insufficiency)
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RELA 225 ILCS 455/38.25 Licensee's relationship with customers
RELA 225 ILCS 455/38.40 Compensation does not determine agency

STATEMENT OF THE CASE

Plaintiff, Schneider a real estate land broker, and Defendant, Ryland, as a buyer, executed a document entitled the Buyer's Acknowledgment of Site Visit (App. 33a)., which memorialized Schneider's performance of a ministerial act with Ryland. The site visit was a ministerial act because it was performed by Schneider on behalf of the seller, North Central College, to sell the parcel pursuant to a verbal open listing agreement Schneider entered into with North Central.

Under the terms of the Ryland contract, Schneider divulged information as to the location, ownership and developmental characteristics of the subject site to Ryland in exchange for Ryland's promise to name Schneider as the procuring broker in any letter of intent, offer to purchase or contract. By doing this, North Central College would be unable to renege on its promise to compensate Schneider with a 5% real estate commission.

The second promise made by Ryland in the contract was to indemnify Schneider against loss of the compensation promised to Schneider by North Central, the owner and seller of the property.

Ultimately, North Central and Ryland secretly entered into negotiations to sell/buy the parcel, which they did in phased purchases beginning in September of 1998 without Schneider's knowledge.

Schneider discovered the sale/purchase in October of 1998 and met with Ryland's land acquisition man who confirmed the purchase. Under the terms of the indemnification agreement, Ryland was liable to compensate Schneider and an invoice was mailed in October of 1998.

Invoicing continued with a monthly 1 ½ % monthly interest charge added to the balance. The invoicing continued on this basis until Ryland's regional president indicated in a letter mailed in July of 2002 that he would not pay the open invoice.

Schneider filed a complaint in January of 2006 consisting of a Breach of Contract claim as well as a Breach of the Duty of Good Faith and Fair Dealing. Ryland filed a Motion to Dismiss under 735 ILCS 5/2-615 and 619 (a) (9).

Ryland theorized that the contract document was a written listing contract that was void for having failed to include an automatic expiration date in accordance with statute, 225 ILCS 455/19 (35a). Schneider responded with numerous reasons based on Illinois statute that this was incorrect and, moreover, that this was not a matter for determination by the circuit court because of the jury demand as well as the Illinois statute that commanded the court to pass on the issue for jury determination. The right to trial is a constitutional right under the Illinois Constitution (32a) as well as Amendment VII (40a). When a jury demand is pending the presiding judge is not permitted to determine issues of disputed fact. 735 ILCS 5/2-619 c (40a) requires the judge to defer determining disputed material facts. The judge ignored the pleading that asserted the right to have the jury determine the issue.

At hearing on the Motion to Dismiss, the circuit court dismissed both Count II, Breach of the Duty of Good Faith and Fair Dealing with prejudice as well as Count I, Breach of Contract with

prejudice, but, found that the contract document was not a listing contract as Ryland had urged. Instead the circuit court issued an order insisting it was a written brokerage agreement that required an automatic expiration date. In accomplishing this, the circuit court applied a new legal definition from the Real Estate Licensing Act of 2000. The contract document had been executed in 1996. The Real Estate Licensing Act of 1983 (as amended in 1996 when the contract was executed) only required a written listing contract to have an automatic expiration date. RELA of 2000 does not incorporate a retroactivity provision. Under Illinois judicial doctrine, the proper law to have been applied was the law as it existed in 1996. RELA of 1983 only required written listing contracts (between a broker and a seller) to have an automatic expiration date or the contract would be void. Both the circuit court and appellate court applied the laws as revised in year 2000.

On appeal, Schneider had asked the appellate court to address the jury demand issue and the lack of the circuit court's legitimate authority to determine whether the contract document was a document that merely memorialized the performance of a ministerial act or whether it was a written buyer's brokerage agreement. The appellate court did not address the issue of the circuit court's lack of legitimate authority to determine this issue. Schneider specifically indicated on appeal exactly where in his pleadings at the circuit court level that the judge was not the trier of fact because of the jury demand. In the appellate court's order that

affirmed the circuit court's decision, the appellate court indicates that Schneider did raise on appeal the right to have a jury determine issues of disputed material fact (9a). The appellate court did not address the jury demand issue as well as the issue raised by Ryland of the insufficiency of the complaint. After the appellate court affirmed the lower court's finding, Schneider requested that the appellate court vacate its order and enter a revised order because the circuit court had reached the issue without authority to do so, and had applied law that had not yet been enacted when the contract was executed. This motion was denied.

Schneider filed a Petition for Writ of Certiorari as of Right and Leave to Appeal with the Illinois Supreme Court. While the Petition was pending Schneider filed a Motion for Supervisory Order on the basis that lower court's orders did not address the right to a jury trial and the relevant part of the Illinois Constitution's Article I Section 13, Trial by Jury. Additionally, Schneider indicated that the lower courts' actions deprived Schneider of his constitutional rights pursuant to Article I Section 2, Due Process and Equal Protection; and Article I Section 12, Right to Remedy and Justice, as well as Article VI Section 6, the right to an appeal.

The Petition for Certiorari and the Motion for Supervisory Order were denied by the Illinois Supreme Court.

Lastly, Schneider asked for the reasons for the denial and the Supreme Court denied the Motion for Reasons for the Denial.

REASONS WHY THE WRIT SHOULD BE GRANTED

There is no basis in law for the circuit court's ruling on the breach of contract claim or the appellate court's affirmation because of the Seventh Amendment to the U.S. Constitution and the Illinois Constitution's right to trial by jury on issues of disputed material fact, as well as Illinois statute that prohibits misconstruing the performance of a ministerial act into a brokerage contract 225 ILCS 455/38.25 (b) (38a). The circuit court had no legitimate authority to render judgment on disputed material facts because of the jury demand. The appellate court declined to address this issue although presented as an issue for determination on appeal. Illinois statute, 255 IILCS 455/38.25 (b) (App. 38a) , prohibits misconstruing a broker's performance of a ministerial act into a performance of a licensed activity that would, in effect, create an implied brokerage agreement.

Moreover, the circuit court issued an order involuntarily dismissing the Breach of Contract claim by applying law that was not in force at the time the contract was executed. The appellate court affirmed utilizing the very same law that antedated the contract. The appellate court's order clearly shows that they utilized law enacted in year 2000, some 4 years after the contract document was executed (App.B. generally, 2a thru 21a).

The contract document (33a) required Ryland to perform two duties on behalf of Schneider. The complaint and the evidence attached to the complaint showed that Ryland unequivocally breached both of those duties.

The contract document did not require Schneider to perform any duties for Ryland.

Under the Illinois Administrative Code 1450.195 (b) (39a), in order for a listing contract to be found to be a listing contract, there must be some duty performed by Plaintiff on behalf of Ryland. There is no broker duty indicated or reasonably implied in the contract wherein Schneider was required to perform a duty for Ryland. On the other hand, the contract clearly required Ryland to perform two duties for the benefit of Schneider. Because of the lack of duty owed by Schneider to Ryland, there could be no logical basis for concluding that the contract was a brokerage agreement.

Importantly, under the RELA of 1983 (as of 1996) only written listing contracts are required to have an automatic expiration date or the listing agreement is void, RELA 225 ILCS 455/19 (35a). Listing contracts, as defined under the Illinois Administrative Code 1450.195 (b) (39a), are between a seller and a broker. Ryland is a buyer and is not a seller. Thus, by definition, the Buyer's Acknowledgment of Site Visit was not a listing contract since North Central College, the seller, did not execute anything, Ryland did. Since it was not a listing contract, and under RELA of 1983 only listing contracts were required to have an automatic expiration date, there was no basis in law for applying legal definitions that were not yet enacted and would not be law until RELA of 2000. The Buyer's Acknowledgment of Site Visit, the contract document that the circuit court determined was a broker agreement, was executed to memorialize Schneider's performance of a ministerial act with Ryland in exchange for Ryland's indemnification clause which required Ryland to perform the (2)

duties that the evidence shows that they ultimately breached. In breaching these duties, Schneider suffered a palpable injury for which the underlying suit was brought.

Still yet, RELA of 1983 expressly indicated that the provisions of Article 4 (225 ILCS 455/38.10), Brokerage Relations, (35a) were enacted to provide a basis for a broker to "prevent ...misinterpretations of the relationships between consumers, real estate brokers..." and additionally disallowed misconstruing the performance of a ministerial act with a customer (Ryland) into a brokerage agreement (225 ILCS 455/38.25 (b) (38a)).

Importantly, case law within the local jurisdiction has established that whether there was an intent to establish a contract between the parties is a disputed material fact that is to be determined by the jury, Yorke v. B.F. Goodrich Co., 130 Ill. App. 3d 220, 222-3, 85 Ill. Dec. 606, 474 N.E. 2d 20, 1985, see also, Turner v. 1212 S. Michigan Partnership, 1st Dist. App. Ct. of Il., 2005, 355 Ill. App. 3d 885, 823 N.E. 2d 1062, 291 Ill. App. Dec. 476.

The appellate court declined addressing an issue presented on appeal of the sufficiency of the complaint. Pursuant to the standards established in Klemm v. Mann, 1st Dist. App. Ct. of Il., 1996, 279 Ill. App. 3d 735, 741, 665 N.E. 2d 514, 216 Ill. Dec. 454, for all practical purposes, the complaint was sufficient.

This Court's establishment of the doctrine of the retroactive application to changes in a statute in Landgraf v. U.S.I. Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed. 2d 229, 1994 had been adopted by the Illinois Supreme Court in its decision in Commonwealth Edison v. Will County Collector, 196 Ill. 2d 27 @37, 749 N.E. 2d 964, Ill. S.

Ct., 2001. The lower courts' orders and analyses conflict with the doctrinal holdings in the cited cases. Granting of the writ and the relief requested will alleviate the conflict.

By granting the petition a significant advance in litigants' rights to jury trial would be realized and reaffirmed in state courts nationwide.

CONCLUSION

The circuit court involuntarily dismissed the breach of contract claim on a provision of Illinois law that considered buyer brokerage agreements that did not have an automatic expiration date void. The circuit court and the appellate court applied law that had been revised some 3 years after the document was executed. The new enactment did not have a retroactivity provision in it.

When the contract was executed, only a listing contract, one that was between a seller and a broker was required by law to have an automatic expiration date. The contract in this case was between Ryland, a buyer, and Schneider, the broker.

There is no relevant law that was in existence at the time the contract was executed that could be applied to allow a court to declare the contract to be a void document.

In any event, because of the jury demand, the court should have deferred a ruling on disputed issues of material fact. Over Schneider's objection, the circuit court declared the contract to be a type of contract that was not yet recognized under the law in existence in 1996 when the contract was executed.

Reestablishing the right to trial by jury in state court proceedings would be greatly enhanced by granting the petition.

Respectfully submitted,

/s/_____

B. Michael Schneider
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APPENDIX

APPENDIX A

SUPREME COURT OF ILLINOIS

No. 106718

[Filed September 24, 2008]

B. Michael Schneider,
Plaintiff-Petitioner

v.

The Ryland Group
Defendant-Respondent

OPINION

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appeallate Court on October 29, 2008.

APPENDIX B

No. 1-06-2735

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

B. MICHAEL SCHNEIDER, Plaintiff-Appellant,	) Appeal from the Circuit) Court of Cook County
v.	) 06 L 410
THE RYLAND GROUP, Defendant-Appellee.	)Honorable Lee Preston,) Judge Presiding.

ORDER

On January 13, 2006, the plaintiff, B. Michael Schneider, filed a two-count complaint against the defendant, The Ryland Group (Ryland). Count I was for breach of contract and count II was for breach of the duty of good faith and fair dealing. Schneider's complaint was based on a document entitled "Acknowledgment of Site Visit" that was signed by an agent of Ryland and purported to be a verbal open listing agreement. Ryland moved to dismiss Schneider's complaint pursuant to section 2-615 and 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-615, 2-619 (West 2006).

On August 28, 2006 the trial court entered an order (1) that dismissed count I pursuant to section

2-619 of the Code (735 ILCS 5/2-619 (West 2006)) because the Acknowledgment of Site Visit is a brokerage agreement; and (2) that dismissed count II of the complaint with prejudice because there is no independent cause of action for breach of the implied duty of good faith and fair dealing in a contract.

Plaintiff argues in this appeal that the trial court erred (1) when it found that the Acknowledgment of Site Visit was a brokerage agreement; and (2) when it found that, as a brokerage agreement the Acknowledgment of Site Visit must contain an expiration date; which it does not contain. We affirm.

BACKGROUND

After Schneider filed his complaint, the defendant filed a motion to dismiss and Schneider filed a response. The facts that are pertinent to this appeal are delineated in Schneider's affidavit which was appended to his response to Ryland's motion to dismiss. Schneider avers in his affidavit that he entered into a verbal open listing agreement with Bruce Nortell, an agent of North Central College (NCC), to sell a parcel of vacant farm land that was located in DuPage Township and had been gifted to NCC by Constance Schoenherr (the land). Nortell, as the agent of NCC, agreed to compensate Schneider with 5 % of the land's gross sales price.The terms of the purported verbal open listing agreement were:(1) Schneider would identify potential buyers and refer them to Nortell; (2) the price would be $30,000-

$39,999 per acre with no firm price demanded by Nortell or NCC; (3) the listing would remain open to Schneider unless Nortell or NCC (a) entered into a contract with a viable buyer; (b) entered into an exclusive listing agreement with another real estate broker; or (c) a decision was made not to sell the land. Plaintiff claims he was to receive a commission at the time of closing that was based on the selling price. The NCC denied the existence of an agreement with the plaintiff.

On January 16, 1996 plaintiff met with John Luczynski, the land acquisition employee of The Ryland Group, Inc. (Ryland). Plaintiff sought to gauge Ryland's interest in purchasing the land. An agreement, entitled "Buyer's Acknowledgment of Site Visit,"was entered into between the plaintiff and Ryland, was signed and dated January 16, 1996, and provided as follows:

"We hereby agree to name Michael Schneider of Schneider Realty Group as the procuring broker in any future offer to purchase, letter of intent or subsequent contract made for the above named parcel. We will guaranty the payment of 5% of the resulting gross sales price. The guaranty is made strictly as a representative of the Ryland Building Corp. and extends to any partnership, joint venture, or other business entity formed by myself or company."

After the Acknowledgment of Site Visit was signed, the land was shown and residential land development data was provided to Ryland.

On February 23, 1996, the plaintiff wrote to Nortell and identified Ryland as a potential buyer and confirmed the terms of the alleged listing agreement with NCC in writing. On February 28, 1996, Nortell wrote to the plaintiff that "[a]ll written proposals/offers were referred to the Board and made subject to apoproval of the Executive Committee of the Board.No proposals/offers referred to the Board were agreed to by the Board nor were counter-proposals made."

On February 28, 1996, Nortell wrote to the plaintiff and explained that NCC Trustee Bob Wislow was authorized to act on behalf of the committee, the board and NCC. Nortell also explained that the plaintiff should contact Wislow directly if needed.

On March 21, 1996, the plaintiff wrote to Wislow to confirm a telephone conversation that took place on March 18, 1996. The plaintiff's letter explained his position that he had been invited by Nortell to handle the marketing and sale of the land for NCC and to actively market the property on an open listing basis.

On April 15, 1996, Harold Wilde, the president of NCC, wrote to the plaintiff and explained in pertinent part, that:
"Bruce Nortell's letter to you of February 28 correctly described North Central's position about the marketing of the property. We have had no agreement with anyone other than Mr. Wislow to market this property from the day it was conveyed in trust to the College. While we are eager to find a buyer at the right price, we will not be hurried into

any course of action that does not meet the criteria we have set."

On October 22, 1998, plaintiff met with Luczynski primarily to discuss property other than the land in question. At that meeting, the plaintiff inquired about the land in question and Luczynski informed the plaintiff that NCC paid $35, 000 per acre for the land. After the meeting, the plaintiff wrote a letter to Luczynski that reference the fact that NCC bought the land and included an invoice for commission in the amount of $262,500. The aforementioned figure was 5% of the total transaction amount of $5,250,000. The invoice also provided that "all amounts due are due within 30 days" and that "any unpaid balance shall bear interest at the rate of 1.5% per month of the unpaid balance." The plaintiff did not make a demand directly to NCC for payment.

On April 19, 2000, David Solomon of the Ryland Group wrote to the plaintiff and acknowledged receipt of the plaintiff's invoice and telephone calls. However, Solomon rejected the plaintiff's claim when he wrote in pertinent part, that:

"I have looked into your claim and inquired about any services that you or your firm rendered in connection with Ryland's purchase of the Schoenherr Farm. My investigation has determined that neither you nor your firm were involved, in any way, with Ryland's acquisition of the Schoenherr Farm. The Buyer's Acknowledgment of Site Visit ("Acknowledgment") that you rely on was dated January 15, 1996. The deal came to Ryland

through another broker in the summer of 1997 and Ryland's contract for acquisition was signed on September 24, 1997, more than one and half years after the acknowledgment. In addition, our attorneys have informed us that the acknowledgment is void under Illinois law because any agreement for compensation to a broker must have a definitive determination date. The acknowledgment undoubtedly does not meet this requirement."

On January 13, 2006, the plaintiff filed a two-count complaint in the law division of the Circuit Court of Cook County (1) for
breach of contract (count I), and (2) for breach of a duty of good faith and fair dealing(count II).

On February 24, 2006, Ryland filed a motion to dismiss pursuant to 2-619 (a) (9) of the Code of Civil Procedure (Code). 735 ILCS 5/2-619 (a)(9) (West 2006). Ryland argued that the court should have dismissed the complaint because the brokerage agreement did not provide for its automatic expiration within a definite period of time as required by section 454/10-25 of the Real Estate License Act (225 ILCS 454/10-25 (West 2006), Title 68, Part 1450 Real Estate License Act of 2000 and Section 1450.195 of the Administrative Code. 68 Ill. Adm. Code 1450.195 (2006). On March 20, 2006, the trial court entered an order that permitted Ryland to withdraw its section 2-619 motion to dismiss, but granted Ryland leave to answer the plaintiff's complaint or otherwise plead.

On April 12, 2006, Ryland filed a combined motion that asked the trial court (1) to dismiss count I of the complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2006)); or, in the alternative (2) to dismiss the complaint pursuant to section 2-619 (a) (9) (West 2006). Pursuant to section 2-615 of the Code, Ryland argued that the complaint was insufficient as a matter of law because the allegations in the complaint conflicted with the exhibits attached thereto. According to Ryland, in order to maintain a cause of action against it as the guarantor of the alleged commission agreement, the plaintiff had to allege the existence of an enforceable listing agreement. Ryland argued that the site visit agreement did not stand by itself because it was a guaranty for performance of an alleged underlying contract. According to Ryland, the exhibits appended to the complaint constituted evidence that no such listing agreement existed because the plaintiff admitted that the alleged listing agreement between him and NCC would only remain effective until NCC entered into an agreement with another broker. Ryland argued the NCC's April 15, 1996, letter to the plaintiff informed him that NCC had an exclusive relationship with Wislow.

Ryland also asked the trial court to dismiss the complaint pursuant to 2-619 of the Code because the Acknowledgment of Site Visit constituted a brokerage agreement that failed to provide for its automatic termination within a definite period of time. Ryland argued before the trial court that the Acknowledgment of Site Visit was a guaranty contract and not an indemnification agreement.

Plaintiff argued before the trial court that Ryland's section 2-615 motion should have been denied because it improperly case a section 2-619 motion to dismiss as a section 2-615 motion to dismiss. Plaintiff argued that the existence of the verbal open listing agreement was a disputed material fact. Plaintiff also argued that Wilde's letter only asserted that Wislow had been given an exclusive listing agreement and did not address whether Nortell had ever given the plaintiff a verbal open listing agreement. Therefore, plaintiff argued that the question of whether there was a verbal open listing agreement was a question for the trier of fact which, in this case, was a jury pursuant to plaintiff' properly filed jury demand.

Plaintiff also argued that Ryland's section 2-619 motion to dismiss should have been denied because the defendant has failed to explain how the Acknowledgment of Site Visit was a brokerage agreement. Plaintiff also argued before the trial court that the Real Estate Licensing Act (RELA) (225 ILCS 454/1 et seq.(West 2006)) did not require that either exclusive or non-exclusive verbal brokerage agreements had to be in writing. Therefore, according to the plaintiff, the language in the Acknowledgment of Site Visit does not imply that it is a brokerage agreement. Plaintiff argued that, because there is no language establishing an intent to create a brokerage agreement, a listing agreement or a written brokerage agreement, there was no basis for dismissing his complaint pursuant to sections 2-615 or 2-619(a) (9) of the Code. 735 ILCS 5/2-615, 2-619 (a) (9) (West 2006).

The trial court's August 28, 2006, order dismissed the plaintiff's complaint pursuant to section 2-619 of the Code (1) because the trial court found that the Acknowledgment of Site Visit was a brokerage agreement between the plaintiff and Ryland; (2) because the document stated (a) that the plaintiff was the procuring broker in any future offer to purchase, letter of intent or subsequent contract made for the land; and (b) that the plaintiff was guaranteed the payment of 5% of the resulting gross sale price payable at closing from the seller firstly and the buyer secondly; and (3) because the Acknowledgment of Site Visit did not contain a provision that provides for an automatic expiration within a definite period as required by section 10-25 of the RELA. 225 ILCS 454/10-25 (West 2006).

The trial court also found that the allegations in count II of the complaint were insufficient as a matter of law. In evaluating Ryland's 2-615 motion, the trial court did not find inconsistencies between the allegations of the complaint and the exhibits. The trial court also found (1) that there was no mention of the plaintiff's alleged verbal agreement with Nortell; (2) that the reference in the February 28, 1996, letter from Nortell to the plaintiff regarding Wislow's role does not necessarily negate the alleged agreement. The trial court did not find that the April 15, 1996, letter from Wilde to the plaintiff was necessarily inconsistent with the allegations in the complaint. However, the April 15, 1996 letter did explain that "we have no agreement with anyone other than Mr. Wilde to market this property from the day it was conveyed." The trial court found that the

Wilde letter did not negate the fact that there was a verbal agreement. The trial court denied Ryland's motion to dismiss count I of the complaint pursuant to 2-615 of the Code. 735 ILCS 5/2-615 (West 2006). Finally, the trial court found that the plaintiff did not plead a recognizable cause of action upon which relief could be granted.

ANALYSIS

Standard of Review

Section 2-615 Motion to Dismiss with Prejudice

The Illinois Supreme Court has consistently held that "[a] section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2006)) challenges the legal sufficiency of a complaint based on defects apparent on its face." Marshall v. Burger King Corporation, 222 Ill. 2d422, 429 (2006), citing City of Chicago v. Berettal U.S.A. Corp., 213 Ill. 2d 351, 364 (2004). An order granting or denying a section 2-615 motion to dismiss is reviewed de novo. Marshall, 222 Ill. 2d at 429, citing Wakulich v. Mraz, 203 Ill. 2d 223, 228 (2003).

In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts." Marshall, 222 Ill. 2d at 429, citing Ferguson v. City of Chicago, 213 Ill.2d 94, 96-97 (2004). Therefore, pursuant to 2-615, Illinois courts should not dismiss a cause of action unless it clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. Marshall, 222 Ill. 2d at 429, citing Canel v. Topinka, 212 Ill.2d 311, 318 (2004); see also Coleman v. Madison Two Associates, 307 Ill. App. 570, 575 (1999).

In order to assist Illinois courts in reviewing the sufficiency of complaints, the Illinois Supreme Court has consistently reminded lower courts that Illinois is a fact-pleading jurisdiction. Marshall, 222 Ill. 2d at 429, citing Weiss v. Waterhouse Securities, Inc. 208 Ill. 2d 439,451 (2004). Although complaint do not need to set out evidence (Chandler v. Illinois Central R.R. Co., 207 Ill. 2d 331, 348 (2003)), a complaint cannot contain conclusory allegations of fact or law (Anderson v. Vanden Dorpel, 172 Ill. 2d 399, 408 (1996)) but must allege facts that bring a claim within a legally recognized cause of action. Marshall, 222 Ill. 2d at 429-30, citing Vernon v. Schuster, 179 Ill. 2d 338, 344 (1997)). Finally, when an order dismissing a section 2-615 motion is reviewed, all well-pleaded facts in the complaint are admitted as true, together with all reasonable inferences which may be drawn from them. Coleman, 307 Ill. App. 3d at 575, citing Peter J. Hartmann Co., v. Capital Bank & Trust Co., 296 Ill. App. 3d 593, 600 (1998) and Barille v. Sears Roebuck & Co., 289 Ill. App. 3d 171, 174 (1997).

Section 2-619 (a) (9) Motion to Dismiss

Section 2-619 (a) (9) of the Code provides that a complaint may be dismissed where "the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619 (a)(9) (West 2004). The Illinois Supreme Court has defined an affirmative matter as a "defense that negates the cause of action completely in or inferred from the complaint." In re Estate of Schlenker, 209 Ill. 2d 456, 461 (2004). "When a ruling on a motion to dismiss,

the trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. The court should grant the motion if the plaintiff can prove no set of facts that would support a cause of action. On appeal, review is de novo. Rodriguez v. Sheriff's Merit Commission, 218 Ill. 2d 342, 349 (2006). Citing In re Chicago Flood Litigation, 176 Ill. 2d 179, 189 (1997).

Brokerage Listing Agreement

The threshold question we must decide is whether the trial court properly dismissed plaintiff's complaint to section 2-619 of the Code. 735 ILCS 5/2-619 (West 2004). Plaintiff argues that the trial court erred when it found that the purported verbal open listing agreement and the Acknowledgment of Site Visit to be a brokerage agreement. Plaintiff argues that the Acknowledgment of Site Visit is not an exclusive written brokerage agreement that would require a definite termination date in accordance with section 10-25 of the RELA. 225 ILCS 454/10-24 (West 2006). According to the plaintiff, the trial court also erred when it found (1) that the statute that defines the term "broker" required Ryland to name the plaintiff as the procuring broker in the buyer's Acknowledgment of Site Visit; and (2) that, because the buyer's Acknowledgment of Site Visit was a brokerage agreement, Ryland was required to pay commission to the plaintiff once NCC refused to do so. The plaintiff argues that the buyer's Acknowledgment of Site Visit is an indemnification agreement because Ryland would

not be required to pay a commission until NCC issued its refusal to pay.

Ryland argues that the trial court correctly found that the buyer's Acknowledgment of Site Visit was a brokerage agreement that required a definite termination date and, because it contained no such termination date, the agreement was void. Ryland also argues that the plaintiff was a real estate broker at all pertinent points and was, therefore, bound by the RELA. Finally Ryland argues that language of the buyer's Acknowledgment of Site Visit was clear and unambiguous.

Illinois courts have historically held that "[t]he primary objective in construing a contract is to give effect to the intent of the parties." Gallagher v. Lenart, 226 Ill. 2d 208, 232-33 (2007), citing Virginia Surety Co. v. Northern Insurance Co. of New York, 224 Ill. 2d 550 (2007) and Schek v. Chicago Transit Authority, 42 Ill. 2d 362 364 (1969); see also Dowling v. Chicago Options Associates, Inc., 226 Ill. 2d 277, 295-96 (2007), citing In re Doyle, 144 Ill. 2d 451, 468 (1991). Illinois principles of contract interpretation incorporate the presumption that " ' [a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence.' " Air Safety, Inc. v. Teachers Realty Corp.,185 Ill. 2d 457, 42 (1999), quoting Western Illinois Oil Co. v. Thompson, 26 Ill. 2d 287, 291 (1962).

Therefore, courts begin their analysis with a consideration of the express terms of the contract, which is considered the best indication of the intent of the parties. Gallagher, 226 Ill. 2d at 233, citing Virginia Surety Co. v. Northern Insurance Co. of New York, 224 Ill. 2d 550, 556 (2007) and Air Safety, Inc. 185 Ill. 2d at 462. A court must construe the language of the contract as a whole "because words derive their meaning from the context in which they are used." Gallagher, 226 Ill. 2d at 233, citing Virginia Surety Co., 224 Ill. 2d at 556 and Air Safety, Inc., 185 Ill. 2d at 463; see also Dowling, 226 Ill. 2d at 296,citing United Airlines, Inc. v. City of Chicago, 116 Ill. 2d 311, 318 (1987).

As previously indicated, the trial court found that the Acknowledgment of Site Visit was a brokerage agreement. In order to determine if the Acknowledgment of Site Visit was a brokerage agreement, we must first understand the definitions of the terms "broker," "brokerage agreement," "exclusive brokerage agreement" and the requirements associated with those terms under RELA.

Section 1-10 of the RELA defines a broker as follows: "[A]n individual, partnership, limited liability company, corporation or registered limited liability partnership other that a real estate salesperson or leasing agent who for another and for compensation, or with the intention or expectation of receiving compensation, either directly or indirectly; (1) Sells, exchanges, purchases, rents, or leases real estate; (2) Offers to sell, exchange, purchase, rent, or lease real estate; (3) Negotiates,

offers, attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of real estate; (4) Lists, offers, attempts, or agrees to list real estate for sale, lease, or exchange; (5) Buys, sells, offer to buy or sell, or otherwise deals in options on real estate or improvements thereon; (6) Supervises the collection, offer, attempt, or agreement to collect rent for the use of real estate; (7) Advertises or represents himself or herself as being engaged in the business of buyer, selling, exchanging, renting, or leasing of real estate; (8) Assists or directs in procuring or referring of prospects, intended to result in the sale, exchange, lease, or rental of real estate; (9) Assists or directs in the negotiation of any transaction intended to result in the sale, exchange, lease, or rental of real estate; (10) Opens real estate to the public for marketing purposes; or (11) Sells, leases, or offers for sale or lease real estate at auction." 225 ILCS 454/1-10 (West 2006).

Section 1-10 of the RELA defines a "brokerage agreement" as follows: "'Brokerage agreement' means a written or oral agreement between a sponsoring broker and a consumer for licensed activities to be provided to a consumer in return for compensation or the right to received compensation from another. Brokerage agreements may constitute either a bilateral or unilateral agreement between the broker and the broker's client depending upon the content of the brokerage agreement. *All exclusive brokerage agreements shall be in writing.*" (Emphasis added.) 225 ILCS 454/1-10 (West 2006).

Section 1-10 of the RELA defines an "exclusive brokerage agreement as follows:"'Exclusive brokerage agreement' means a written brokerage agreement that provides that the sponsoring broker has the sole right, through on or more licensees, to act as the exclusive designated agent or representative of the client and that means the requirements of Section 15-75 of this Act." 225 ILCS 454/1-10 (Footnote; Section 15-75 of the RELA provides that "[a]ll exclusive brokerage agreements must specify that the sponsoring broker, through on or more licensees, must provide, at a minimum, the following services: (1) accept delivery of and present to the client offers and counteroffers to buy, sell, or lease the client's property or the property the client seeks to purchase or lease; (2) assist the client in developing, communicating, negotiating, and presenting offers, counteroffers, and notices that relate to the offers and counteroffers until a lease or purchase agreement is signed and all contingencies are satisfied or waived; and (3) answer the client's questions relating to the offers, counteroffers, notices, and contingencies." 225 ILCS 254/15-75 (West 2006). Section 10-25 of the RELA provides, in pertinent part, that:"No licensee shall obtain any written brokerage agreement that does not provide for the automatic expiration within a definite period of time. No notice of termination at the final expiration thereof shall be required. *Any written brokerage agreement not containing a provision for automatic expiration shall be void...*"(emphasis added) 225 ILCS 454.10-25 (West 2006).

Finally, section 1450.195 of the Illinois Administrative Code provides, in pertinent part, that: "(A) All exclusive brokerage agreements, including all exclusive listing agreements and
exclusive buyer brokerage agreements, shall be in writing; and (B) All written buyer brokerage agreements, whether exclusive or non-exclusive, shall contain the following: (1) the agreed basis or amount of compensation and time of payment; (2) duration of the buyer brokerage agreement, clearly set forth; (3) the name of the broker and the buyer; (4) the signatures of the parties; and (5) the duties of the buyer's broker." 68 Ill. Adm. Code 1450.195 (2006).

The Acknowledgment of Site Visit provided that Ryland "agree[d] to name Michael Schneider of Schneider Realty Group *as the procuring broker in any future offer to purchase, letter of intent or subsequent contract* made for the above named parcel." (Emphasis added) The Acknowledgment of Site Visit also provided a guaranty of payment to the plaintiff in the event of the sale of the property. Although it was entitled an Acknowledgment of Site Visit, we find that, because it provided (1) that the plaintiff was to be the procuring broker in any future offer to purchase, letter of intent or subsequent contract, (2) that the plaintiff would be entitled to a guaranteed payment of 5% of the resulting gross sales priced, payable at closing, and (3) that any commission due to the plaintiff's activities would be paid first from seller and then from the buyer in the event of the seller's refusal to

pay, the Acknowledgment of Site Visit represented an attempt to enter into an exclusive brokerage agreement pursuant to RELA. 225 ILCS 454/1 et seq. (West 2006). However, we also find that, pursuant to section 10-25 of the RELA, the failure to include a provision in the Acknowledgment of Site Visit for automatic expiration of the exclusive brokerage agreement renders it void. 225 ILCS 454/10-25 (West 2006) ("Any written brokerage agreement not containing a provision for automatic expiration shall be void"). Accordingly, because the Acknowledgment of Site Visit was an exclusive brokerage agreement that lacked a provision for automatic expiration, the brokerage agreement was void and the trial court correctly dismissed the plaintiff's complaint pursuant to section 2-619(a)(9) of the Code. 735 ILCS 5/2-619 (a) (9) (West 2006).

Good Faith and Fair Dealing

Next, plaintiff seeks reversal of the trial court's dismissal with prejudice of count II of the complaint. Ryland responds and argues that count II of the complaint was properly dismissed with prejudice because there is no separate, independent or recognizable cause of action for the breach of good faith and fair dealing.

In Illinois, every contract carries with it an implied duty of good faith and fair dealing. Gore v. Indiana Ins. Co., 376 Ill. App. 3d 282, 286 (2007), citing Dayan v. McDonald's Corp. 125 Ill App. 3d 972, 991 (1984). The purpose of the implied duty of good faith and fair dealing is to "ensure that parties do not take advantage of each other in a

way that could not have been contemplated at the time the contract was drafted or do anything that will destroy the other party's right to receive the benefit of the contract." Gore, 376 Ill. App. 3d at 286, citing Cramer v. Insureance Exchange Agency, 174 Ill. 2d 513, 523-24 (1996). However, [i]t is axiomatic that only duties arising out of a contract itself can give rise to a breach." Gore, 376 Ill. App. 3d at 287, citing Martin v. State Farm Mutual Automobile Insurance Co., 348 Ill. App. 3d 846, 853 (2004). The covenant of good faith and fair dealing does not allow a party to read an obligation into a contract that does not exist." Suburban Ins. Services, Inc. v. Virginia Surety Co., Inc., 276 Ill. App. 3d 688, 693 (2001), citing Northern Trust Co. v. VIII South Michigan Associates, 276 Ill. App. 3d 355, 368 (1995) and Bank One, Springfield v. Roscetti, 309 Ill. App.3d 1048 (1999). Therefore, the trial court correctly dismissed count II of the plaintiff's complaint with prejudice because, despite the implied covenant of good faith and fair dealing, "parties to a contract are entitled to enforce its terms to the letter, and an implied convenant of good faith and fair dealing cannot overrule or modify the express terms of a contact. Accordingly, we hold that there is no independent cause of action in tort for a party's breach of the duty of good faith and fair dealing (Cramer, 174 Ill. 2d at 525), therefore, the trial court did not err when it dismissed count II of the complaint with prejudice.

CONCLUSION

In light of the foregoing, the trial court's August 28, 2006, order that dismissed the complaint pursuant to section 2-619 (a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2006)) is affirmed.

Affirmed.
NEVILLE, P.J. with CAMPBELL, J., and O'BRIEN, J. concurring.

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT LAW DIVISION
No. 06 L 410
(Filed August 28, 2006)

B. Michael Schneider, Plaintiff
v.
The Ryland Group, Inc., Defendant

ORDER

THIS CAUSE COMING ON TO BE HEARD, on defendant, The Ryland Group, Inc.'s, ("Ryland") Motion to Dismiss Plaintiff B. Michael Schneider's ("Schneider") Complaint pursuant to 735 ILCS 4/2-615 and 735 ILCS 5/2-619, and the Court having considered the briefs submitted and the arguments of counsel, and the court being fully advised in the premises;

IT IS HEREBY ORDERED that defendant's Motion to Dismiss pursuant to 735 ILCS 5/2-615 is denied as to Count I;Plaintiff's Count II is dismissed with prejudice. Defendant'sMotion to Dismiss County I pursuant to 735 ILCS 5/2-619 is granted, and plaintiff's Count I is also dismissed with Prejudice.

Allegation Common to Counts I and II

In the Complaint, plaintiff alleges that plaintiff entered into a verbal open listing agreement with Bruce Nortell ("Nortell"),North Central College's ("North Central") agent to locate aBuyer for a donated parcel fo developable land ("Schoenherr Parcel") in DuPage Township. (Pl. Compl. 6). Plaintiff alleges that Nortell agreed to compensate plaintiff 5 percent of the gross sales price of the parcel. (Pl. Compl. 7). Plaintiff alleges that the terms of the verbal agreement were as follows: 1) plaintiff would identify all potential buyers to Nortell; the price per acre would be the lower to upper $30,000, with no firm price demanded by Nortell; the listing would remain open to plaintiff unless Nortell/North Central had; 1) entered into a contract with a viable buyer; 2) entered into an exclusive listing agreement with another real estate broker; or 3) decided not to sell the property. (Pl. Compl. 7). Plaintiff alleges that the agreement provided he would be paid the commission at the time of the initial closing in a sum calculated on the entire amount. (Pl. Compl. 7). Plaintiff alleges that none of the above conditions occurred. (Pl. Compl. 7).

Plaintiff alleges that in January of 1996, he met with John Luczynski ("Luczynski"), Ryland's agent, at which time plaintiff alleges he obtained a written indemnification agreement from Luczynski, which was predicated on the possibility of North Central's refusal to honor the verbal agreement and pay plaintiff the 5 percent commission.(Pl. Compl. 8).

Plaintiff alleges that Ryland agreed to designate Schneider as the procuring cause and to indemnify Schneider in the amount of 5 percent of the total sale price for the Schoenherr Parcel. (Pl. Compl. 8). In February 1996, plaintiff wrote Nortell, identifying Ryland/Luczynski as potential buyers. (Pl. Compl. 9). In March 1996, plaintiff alleges North Central College's Executive Committee representative Robert Wislow informed plaintiff that Wislow was the only authorized real estate broker to represent North Central, and that he would do so on a pro bono basis; plaintiff alleges that this was confirmed by North Central President Harold Wilde ("Wilde"). (Pl. Compl. 12, 13).

Plaintiff alleges that after more than a year and a half of unreturned phone calls to Luczynski regarding other potential business opportunities, plaintiff met with Luczynski in October of 1998 to pitch other parcels and learned of Ryland's purchase of the Schoenherr parcel on a phased basis for $35, 000 per acre. (Pl. Compl 14, 15, 16). Plaintiff alleges that he generated an invoice in the amount he believed correct and sent these invoices to Ryland monthly beginning in October of 1998 through July 2002, but all remain unpaid. (Pl. Compl. 17, 18, 19, 20). Plaintiff alleges that he spoke with Ryland controller David Solomon ("Solomon") in April 2000, and that on April 19, 2000, Solomon sent plaintiff a letter denying plaintiff's claim allegedly on the basis of a lack of "definitive determination date" on advice of Ryland's attorney, Scott Gudmundson (Pl. Compl. 21, 22). Plaintiff alleges that in a phone call with Gudmundson, Gudmundson told plaintiff that

another broker had been paid a commission, and identified the broker as David Loeb. (Pl. Compl 23, 24). Plaintiff alleges on information and belief that Ryland and/or North Central paid a real estate brokerage commission to David Loeb on the transaction between Ryland and North Central on the Schoenherr parcel "even though plaintiff had a verbal listing agreement from North Central and a written guarantee from Ryland to pay the 5 percent commission in the event of North Central's refusal to pay." (Pl. Compl. 28). Plaintiff alleges that upon information and belief, defendants owe plaintiff in excess of $75,000. (P. Compl. 29).

In Count I-Breach of Contract The Ryland Group, in addition to the common allegations, plaintiff alleges that Ryland breached its agreement with Schneider, causing Plaintiff damages. (Pl. Compl. 38).

In Count II-Breach of Duty of Good Faith and Fair Dealing, in addition to the common allegations, plaintiff alleges that Ryland concealed from plaintiff the negotiation between Ryland and North Central, and failed to contact plaintiff to include him in the negotiation process, thereby breaching the implied covenant of good faith and fair dealing and causing plaintiff damages in the amount of 5 percent of the purchase price. (Pl. Compl. 39, 41). Plaintiff's Count II does not plead a proper cause of action. Every contract contains an implied covenant of good faith and fair dealing. Suburban Ins. Services, Inc., v. Virginia Surety Co., 322 Ill. App. 3d 688, 693 (1st Dist. 2001).

However, this covenant stands as part of an action for breach of contract and is not its own separate cause of action. Therefore, plaintiff's Count II is dismissed with prejudice as there is no set of facts that plaintiff can prove that would entitle plaintiff to recovery on this theory.

Ryland Motion to Dismiss Count I Pursuant to 735 ILCS 5/2-615

A motion to strike or dismiss pursuant to 735 ILCS 5/2-615 attacks the legal sufficiency of the pleading based upon the facts allege in the pleading. Schaffner v. 514 West Grant Place Condo Ass'n, Inc., 324 Ill. App. 3d 1033 (1st Dist. 2001). In a motion brought pursuant to 735 ILCS 5/2-615, the court may only consider the allegation in the pleading and the exhibits attached thereto. Haddick v. Valor Ins., 198 Ill. 2d 409, 413-14 (2001). A court considering a 2-615 motion must accept as true all well-pled facts of the pleading and reasonable inferences to be drawn therefrom. *Id.* A pleading should not be dismissed unless it appears there is no set of facts that can be proven that would entitle the party to recover. Haddick, 198 Ill. 2d 409 (2001).

Defendant argues that the material allegation in the Complaint conflict with the Exhibits attached to the Complaint, and that the Exhibits do not support plaintiff's claims.(Def. Motion pp. 3-4). Specifically, defendant argues that contrary to plaintiff's allegations, there was no enforceable listing agreement with North Central "as evidenced in North Cental's letters to plaintiff

dated February 18, 1996 and April 25, 1996," which were attached to plaintiff's Complaint, unequivocally stating "We have no agreement with anyone other than Mr. Wislow to market this property." (Def. Mot. To Dismiss p. 4). Based on this, defendant argues that a listing agreement never existed, and that without a valid underlying agreement between plaintiff and North Central for a 5 percent sales commission, Ryland, as an alleged guarantor, has no obligation to pay. (Def. Mot. To Dismiss p. 5).

In reading the Exhibits provided in defendant's Motion, the court does not find such blatant inconsistencies between plaintiff's Complaint, and the Exhibits. Plaintiff alleges that he entered into a verbal open listing agreement with Nortell as agent of North Central; the letter contained in Exhibit 4 of defendant's Motion, the defendant has attached as the Complaint's Exhibit D, is dated February 28, 1996, and appears to be a letter from Nortell to Mr. Schneider. In this letter, Nortell informs Schneider that Trustee Bob Wislow was authorized at a February 1995 meeting of North Central's Board of Trustees "to act in this matter [RE: Schoenherr Trust/Farmland] on behalf of the Committee, the Board and the College." (Def. Mot. To Dismiss, Exhibit 4). There is no mention of plaintiff's alleged verbal agreement with Nortell; and the reference to Mr. Wislow's role does not necessarily negate the agreement. Additionally, the content of the letter does not unequivocally contradict plaintiff's allegations.

The court does not find that the April 15, 1996 letter is necessarily inconsistent with plaintiff' allegation. Defendant attached this letter as Exhibit 6 to its Motion, but argues that it was Exhibit G of plaintiff's Complaint, to show that there was no listing agreement as alleged by plaintiff. This letter, to Mr. Schneider from Harold Wilde, president of North Central, states; "We have no agreement with anyone other than Mr. Wislow to market this propery from the day it was conveyed" This Exhibit does not necessarily negate Schneider's allegation that he had a verbal open listing agreement with Nortell, an alleged agent of North Central.

Defendant's Motion to Dismiss argues that the documents attached to plaintiff's Complaint, specifically Exhibits 4 and 6 are "directly at odds" with plaintiff's allegations and are "evidence that no such listing agreement ever existed." (Def. Mot. To Dismiss p. 4). As shown, however, the court does not find that this is clearly the case in the fact of all of plaintiff's well-pled allegations.

For this reason, defendant' Motion to Dismiss pursuant to 735 ILCS 5/2-615 is denied.

Ryland's Motion to Dismiss Pursuant to 735 ILCS 5/2-619

A section 2-619 motion is designed to provide a summary disposition of issues of law or easily proven issues of fact. Melko v. Dionisio, 219 Ill App 3d 1048, 1057 (2d Dist.1991). Such a motion admits all well-pled facts alleged in the complaint and reasonable inferences to be drawn from those

facts. Ciono v. Gerhart, 201 Ill. App. 3d 853, 856 (3d Dist. 1990). Where evidentiary material is submitted that contradicts well-pled allegations of fact in the complaint, the trial court should not dismiss a complaint pursuant to section 2-619. Melko, 219 Ill. App. 3d at 1057.

Defendant argues that, in the alternative, the Site Visit Agreement is in reality a brokerage listing agreement and written brokerage agreements must contain an expiration date pursuant to the Real Estate License Act 225 ILCS 454.1 et seq, which provides: "any written brokerage agreement not containing a provision for automatic expiration shall be void (225 ILCS 454.10-25)." (Def. Mot. to Dismiss p. 5). Defendant argues that the Site Listing Agreement that plaintiff had Ryland execute was in reality nothing more than a listing agreement, whereby Ryland would pay plaintiff a 5 percent commission in North Central sold the property to Ryland and North Central did not pay a commission to plaintiff; and that plaintiff is attempting to collect the commission on the basis that plaintiff was the sole procuring cause of Ryland's purchase from North Central. (Def. Mot. to Dismiss p.6). Defendant argues that despite plaintiff's characterization of the agreement as an indemnification or guarantee agreement, it is in reality a written exclusive buyer's brokerage agreement subject to the owner's failure to pay a commission that, on its face, does not comply with the Real Estate License Act because it does not specify the duration of the agreement. (Def. Mot. to Dismiss p.6).

Whether the Site Visit Agreement is, as defendant argues, in realitya brokerage listing agreement is a question of law.

Under the Illinois Real Estate License Act, a Brokerage Agreement is defined as:

[A] written or oral agreement between a sponsoring broker and a consumer for licensed activities to be provided to a consumer in return for compensation or the right to receive compensation from another. Brokerage agreements may constitute either a bilateral or a unilateral agreement between the broker and the broker's client depending upon the content of the brokerage agreement.225 ILCS 454/1-10 (2006).

The court finds that the document entitled "Buyer's Acknowledgment of Site Visit" is a Brokerage Agreement between plaintiff and Ryland. The document states that:
"We hereby agree to name Michael Schneider of Schneider Realty Group as the procuring broker in any future offer to purchase, letter of intent or subsequent contract made for the above named parcel"...and "We will guaranty the payment of 5 percent of the resulting gross sales price payable at closing. [I]t is our understanding that any commissions will be payable by the seller firstly and we the buyer secondly." (Def. Mot. to Dismiss, Exhibt 2).

Pursuant to 225 ILCS 454/10-25:

No licensee shall obtain any written brokerage

agreement that does not provide for automatic expiration within a definite period of time. No notice of termination at the final expiration thereof shall be required. Any written brokerage agreement not containing a provision for automatic expiration shall be void. When the license of any sponsoring broker is suspended or revoked, any brokerage agreement with the sponsoring broker shall be deemed to expire upon the effective date of the suspension or revocation.

The "Buyer's Acknowledgment of Site Visit: does not contain a term that provide for an automatic expiration within a definite period, and thus fails to comply with the statutory requirements. Pursuant to 225 ILCS 454/10-25, the court finds the agreement void. For this reason, defendant's Motion to Dismiss pursuant to 725 ILCS 5/2-619 is granted in that plaintiff's Complaint is dismissed with prejudice.

WHEREFORE, defendant's Motion to Dismiss pursuant to 735 ILCS 5/2-615 is denied as to Count I: plaintiff's Count II is dismissed with prejudice. Defendant's Motion to Dismiss Count I pursuant to 735 ILCS 5/2-619 is granted, and plaintiff's Count I is also dismissed with prejudice.

ENTERED:

/s/_____
Judge Lee Preston
August 28, 2006
Circuit Court 1652

APPENDIX D

Supreme Court of the United States
OFFICE of the Clerk
Washington, DC 20543-0001

Mr. B. Michael Schneider
126 Inner Ct.
New Lenox, Il. 60451

Re: B. Michael Schneider v. Ryland Group
Application No. 08A477

Dear Mr. Schneider:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on December 1, 2008 extended the time to and including February 21, 2009.

This letter has been sent to those designated on the attached notification list.

Note that if you wish to seek review of the case entitled B. Michael Schneider v. Lee Preston, et al., a separate application for an extension of time is necessary.

Sincerely,
William K. Suter, Clerk

By Sandy Spagnolo
Case Analyst

APPENDIX E

BUYER'S ACKNOWLEDGMENT OF SITE VISIT

By my signature below I acknowledge our site examination of the land parcel located in Bolingbrook, Il. and described as follows; 160 acres on the north side of Ferguson Rd. (119th St.) and ¼ mile west of Weber Rd. shown on the Will County Platbook as "Schoenherr" and owned by North Central College.

We hereby agree to name Michael Schneider of Schneider Realty Group as the procuring broker in any future offer to purchase, letter of intent or subsequent contract made for the above named parcel. We will guaranty the payment of 5% of the resulting gross sales price payable at closing. Furthermore, it is our understanding that any commissions will be payable by the seller firstly and we the buyer secondly in the event the seller refuses to pay the commission in 5% of the gross sales price.
The guaranty is made strictly as a representative of the Ryland Building Corp. and extends to any partnership, joint venture, or other business entity formed by myself or company.

/s/_____ /s/_____

Buyer as Representative of Ryland Homes
1051 Perimeter Dr.
Bolingbrook, Il. Date 1/15/96

Michael Schneider,
Broker

APPENDIX F

West's Smith-Hurd Illinois Compiled Statutes
Annotated
Chapter 225 Professions and Occupations
Service and Sales
Act 455. Real Estate Licensing Act of 1983
Article 1. Real Estate Licensing
Copr. West 1996

455/4 Definitions (in relevant part)

(4) "Broker" means and individual, partneership, limited liability company, or corporation, other than a real estate salesperson, who for another and for compensation:

(a) Sells, exchanges, purchases, rents or leases real estate.

(b) Offers to sell, exchange, purchase, rent or lease real estate

(c) Negotiates, offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate.

(d) Lists, offers, attempts or agrees to list real estate for sale, lease or exchange.

(e) Buys, sells, offers to buy or sell or otherwise deals in options on real estate or improvements thereon.

(f) Collects, offers, attempts or agrees to collect rent for the use of real estate.

(g) Advertises, or represents himself as being engaged in the business of buying, selling, exchanging, renting or leasing of real estate.

(h) Assists or directs in procuring of prospects, intended to result in the sale, exchange, lease, or rental of real estate.

(i) Assists or directs in the negotiation of any transaction intended to result in the sale, exchange, lease, or rental of real estate.

(j) Employs or supervises a leasing agent or agents.

455/18.2a Exclusive representation

18.2a. Exclusive representation. (in relevant part)

....A broker entering into an agreement under the provisions of this Section shall not be considered to be acting for more than one party in a transaction if the salespersons specifically designated as legal agents of a person are not representing more than one party in a transaction. No licensee shall be considered a dual agent nor shall the licensee be liable for acting as an undisclosed dual agent merely by performing licensed services in accordance with the provisions of this Section.

455/19 Listing contract—Automatic expiration

19. No licensee shall obtain any written listing contract which does not provide for automatic expiration within a definite period of time. No notice of termination at the final expiration thereof shall be required. Any listing contract not containing a provision for automatic expiration shall be void.

ARTICLE 4 BROKERAGE RELATIONS

455/38.5 Legislative intent

38.5. Legislative intent. (a) The General Assembly finds that application of the common law of agency to the relationships among real estate brokers and salespersons and consumers of real estate brokerage services has resulted in misunderstandings and consequences that have been contrary to the best interests of the public; the General Assembly further finds that the real estate brokerage industry has a significant

impact upon the economy of the State of Illinois and that it is in the best interests of the public to provide codification of the relationships by consumers, real estate brokers, and salespersons and thus promote and provide stability in the real estate market. This Article is enacted to govern the relationships between consumers and real estate brokerage services and real estate brokers and salespersons to the extent not governed by individual written agreements. This Article applies to the exclusion of the common law concepts of principal and agent and to the fiduciary duties, which have to this date been applied to real estate brokers, salespersons, and real estate brokerage services.

(b) The General Assembly further finds that this Article is not intended to prescribe or affect contractual relationships between real estate brokers and the broker's affiliated licensees.

(c) This Article may serve as a basis for private rights of action and defenses by sellers, buyers, landlords, tenants, real estate brokers, and real estate salespersons. The private rights of action, however, do not extend to the provisions of Article 1 of this Act.

ARTICLE 4 BROKERAGE RELATIONS

455. 38.10 Definitions (in relevant part)

"Act" means the Real Estate License Act of 1983.

"Broker" is denied as in Article 1 of this Act.

"Brokerage agreement" means a written or oral agreement for brokerage services to be provided to a consumer inreturn for compensation or the right to receive compensation from another.

"Brokerage services" means those activities of a broker specified in Section 4 of Article 1 of this Act.

"Client" means a person who is being represented by a licensee.

"Customer" means a consumer who is not being represented by a licensee but for whom the licensee is performing ministerial acts.

"Ministerial acts" means those acts that a licensee may perform for a consumer that are informative in nature and do not rise to the level of active representation on behalf of a consumer. Examples of these acts include, but are not limited to, (i) responding to phone inquiries from a consumer as to the availability and pricing of brokerage services;

(ii) responding to phone inquiries from a consumer concerning the price or location of property;

(iii) attending an open house and responding to questions about the property from a consumer;

(iv) setting an appointment to view property;

(v) responding to questions of consumers walking into a licensee's office concerning brokerage services offered or particular properties;

(vi) accompanying an appraiser, inspector, contractor, or similar third party on a visit to a property;

(vii) describing a property or the property's condition in response to a consumer's inquiry;

(viii) completing business or factual information for a consumer on an offer or contract to purchase on behalf of a client;
(ix) showing a client through a property being sold by an owner on his or her own behalf; or
(x) referral to another broker or service provider.

Article 4
455/38.15 Relationships between licensees and consumers
38.15 Relationships between licensees and consumers. Licensees shall be considered to be representing the consumer they are working with as a designated agent for the consumer unless: (1) there is a written agreement between the broker and the consumer providing that there is a different relationship; or (2) the licensee is performing only ministerial acts on behalf of the consumer.

Article 4
455/38.25 Licensee's relationship with customers
38.25 Licensee's relationship with customers (in relevant part)

(b) A licensee representing a client in a real estate transaction may provide assistance to a customer by performing ministerial acts. Performing those ministerial acts shall not be construed in a manner that would violate the brokerage agreement with the client, and performing those ministerial acts for the customer shall not be construed in a manner as to form a brokerage agreement with the customer.

Article 4
455/38.40 Compensation does not determine agency relationship.
455/38.40 Compensation does not determine agency relationship. The payment or promise of payment of compensation to a broker or salesperson is not determinative of whether an agency relationship has been created between any licensee and a consumer.

WEST'S ILLINOIS ADMINISTRATIVE CODE
TITLE 68: Professions and Occupations
Chapter VII (2) : Department of Financial and Professional Regulation
Part 1450: Real Estate Licensing Act of 2000
Subpart D: Compensation and Business Practices
(in relevant part)

c) All written listing agreements, whether exclusive or non-exclusive, shall contain the following:
1) the list price;
2) the agreed basis or amount of commission and the time of payment of the commission;
3) the duration of the listing agreement, with a definite termination date clearly set forth;
4) the name of the broker and seller;
5) the identification of the property involved (address or legal description);
6) the signatures of the parties; and
7) the duties of the listing broker.

APPENDIX G

U.S. CONSTITUTION
AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Illinois Constitution
Article 1 Section 13
Right to Jury Trial

The right of trial by jury as heretofore enjoyed shall remain inviolate.

Illinois Constitution
Article I Section 2
Due Process and Equal Protection

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Illinois Constitution
Article I Section 12
Right to Remedy and Justice

Every person shall find a certain remedy in the laws for all injuries and wrongs which he received to his person,
privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

Illinois Constitution
Article VI Section 6
Right to an Appeal

Appeals from final judgment of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal. The Supreme Court may provide by rule for appeals to the Appellate Court from other than final judgments of the Circuit Courts. The Appellate Court may exercise original jurisdiction when necessary to the complete determination of any case on review. The Appellate Court shall have such powers of direct review of administrative action as provided by law.

735 ILCS 5/2-615 Motions with Respect to Pleadings

(a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.

(b) If a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.

(c) Upon motions based upon defects in pleadings, substantial defects in prior pleadings may be considered. (d) After rulings on motions, the court may enter appropriate orders either to

permit or require pleading over or amending or to terminate the litigation in whole or in part.(e) Any party may seasonably move for judgment on the pleadings.

735 ILCS 5/2-619 (c). Involuntary Dismissal
(In relevant part)

(c) If, upon hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged, or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall so deny it if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time.

(2)

No. 08-1318

Supreme Court, U.S.
FILED
MAY 27 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

B. MICHAEL SCHNEIDER,

Petitioner,

vs.

THE RYLAND GROUP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Petitioner has waived his argument by not addressing it in the lower courts that the amended Illinois Real Estate Licensing Act was improperly applied to the parties' agreement?

2. Whether certiorari is warranted because the lower court rulings did not create any confusion or conflict in the law?

3. Whether the dismissal of the Petitioner's complaint by the lower courts as a matter of law while the Petitioner maintained a demand for a trial by jury is a violation of the State of Illinois Constitution and the Seventh Amendment to the U.S. Constitution?

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STATEMENT OF JURISDICTION

Petitioner invoked the jurisdiction of this Court under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

I. Procedural History

On August 28, 2006, the Circuit Court of Cook County, Illinois, dismissed the Petitioner's complaint with prejudice. The Illinois Appellate Court affirmed the Circuit Court on May 1, 2008. The Petitioner proceeded to file two motions in the Illinois Appellate Court, namely, 1) a Motion to Vacate the Order Entered by the Appellate Court and the Trial Court, and 2) Plaintiff's Motion for Oral Argument and Request to Vacate the Order Entered by the Court on May 1, 2008. Both motions were denied on July 9, 2008. Within the appropriate time period, Petitioner filed a Petition for Appeal as of Right and Petition for Leave to Appeal with the Illinois Supreme Court which the court denied on September 24, 2008. Petitioner also filed with the Illinois Supreme Court a Motion for a Supervisory Order pursuant to Illinois Supreme Court Rule 383, which the court denied on October 20, 2008. Petitioner then filed a Motion to Recall Mandate and a Motion to Reconsider the Motion to Vacate the Order of the Circuit Court that dismissed Count I, the Breach of Contract claim. Neither of those motions were considered because the Illinois Appellate Court had lost jurisdiction and an

appropriate order to that effect was entered on January 16, 2009.

II. Facts Relevant to the Petition

Petitioner alleged that he entered into a "verbal open listing agreement" with North Central College (the "College") to locate a buyer for property located in DuPage Township, Will County. (Petitioner's Appendix 3a).[1] Petitioner approached an agent of The Ryland Group, Inc. ("Ryland") to discuss the subject property and requested that he sign a written agreement concerning the above-referenced property captioned "Buyer's Acknowledgment of Site Visit" (the "Agreement") (Pet. App. 3a-4a). Under the terms of the above-document Ryland agreed to name the Petitioner "as the procuring broker in any future offer to purchase, letter of intent or subsequent contract made for the above named parcel," and further stated that it would "guaranty the payment of 5 percent of the resulting gross sales price payable at closing" with the express statement that "any commissions will be payable by the seller first and we the buyer secondly." (Pet. App. 4a). The College denied, in writing, that there was any agreement with the Petitioner or that it had reached an understanding with the Petitioner to list the subject property. (Pet. App. 5a).

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[1] Reference to Petitioner's Appendix appears as "Pet. App. ___" hereinafter.

Approximately two (2) years later Ryland did purchase the property from the College pursuant to the efforts of a different broker. (Pet. App. 5a). Petitioner was not involved in the eventual sale of the property but upon learning of the transaction made demand on Ryland for payment of a commission under the Agreement. (Pet. App. 5a). Ryland refused to pay the Petitioner a commission and urged that if anyone was responsible to pay Petitioner, the College was responsible for the payment of any commission pursuant to his alleged listing agreement. (Pet. App. 5a). In any event, the Agreement with Ryland did not contain a provision providing for its automatic expiration within a definite period, therefore, rendering it void for failure to comply with legal requirements under the Illinois Administrative Code Section 1450.195 and other subsequently enacted Illinois statutes. (Pet. App. 5a, 6a, 14a-15a). At the time the parties executed the Agreement, Section 1450.195 of the Illinois Administrative Code required written brokerage agreements to contain a definite termination date. (Pet. App. 14a).

After the parties fully briefed the matter and a hearing was held on the Ryland's motion to dismiss, the trial court determined that the allegations contained in the Petitioner's complaint were insufficient as a matter of law and dismissed the entire action with prejudice. (Pet. App. 14a, 24a). The trial court's August 28, 2006, six (6) page decision discussed the grounds for dismissal of the complaint. (Pet. App. 17a-24a). The court granted Ryland's

motion to dismiss Count I of the complaint pursuant to the Illinois Code of Civil Procedure, 735 ILCS 5/2-619 and determined that the Agreement was "void" under the Illinois Real Estate License Act of 1983, 225 ILCS 454/10-25 ("RELA") because it did not provide "for an automatic expiration within a definite period, and thus failed to comply with the statutory requirements" (Pet. App. 14a and 24a). Petitioner did not object to the application of the RELA by the trial court, as demonstrated by the issues discussed by the court in its order. (Pet. App. 17a-24a). Similarly, the Petitioner did not object to the application of the revised RELA in the Illinois Appellate Court and did not argue the issue in his Brief and Argument of Plaintiff-Appellant nor the Reply Brief of Plaintiff-Appellant, as evidenced by that court's discussion of the issues on appeal and arguments raised by Petitioner. (Pet. App. 2a-16a).

ARGUMENT

The Petitioner long ago waived his argument that the RELA, which requires a brokerage agreement to have a definite termination date, was not enacted by the Illinois General Assembly until after the parties had signed the agreement. For the first time, Petitioner has also presented a constitutional argument that the Seventh Amendment of the U.S. Constitution prohibited the dismissal of his complaint in the trial court because he had demanded trial by a jury. Petitioner failed to properly raise any of these

arguments in the lower courts and he is simply moving from past arguments to new arguments as he advances through the courts. Additionally, the Petitioner attempts to argue, unsuccessfully, that his right to a jury trial prohibits the dismissal of his complaint even though that dismissal was as a matter of law.

I. Petitioner has waived his arguments regarding the application of the RELA and his right to a jury trial pursuant to the State of Illinois Constitution and the Seventh Amendment of the U.S. Constitution.

This Court has stated as a general rule that issues must be raised in lower courts to be preserved as potential grounds of decision in higher courts. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469, 120 S.Ct. 1579, 1586, 146 L.Ed.2d 530 (2000), *citing Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174-175, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988). While this "principle does not demand the incantation of particular words . . . it requires that the lower court be fairly put on notice as to the substance of the issue." *Id.* The Petitioner never put the lower courts on notice of his arguments that the RELA was unfairly applied. (Pet. App. 3a, 20a and 24a). The trial court and the appellate court both identified the arguments and issues raised by the Petitioner and the courts' discussion of points raised is devoid of any issue concerning the retroactive application of the revised RELA. (Pet. App. 3a, 20a and 24a). Accordingly, the

Petitioner's arguments concerning the "retroactive" application of the amended RELA have been waived.

Additionally, the Petitioner's argument that the dismissal of his complaint in light of his jury demand violates the Seventh Amendment of the U.S. Constitution has been waived. This Court has previously stated that

> [w]ith "very rare exceptions," *Yee v. Escondido,* 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997) (citations omitted). See also, *Ellis v. Dixon*, 349 U.S. 458, 463-464, 75 S.Ct. 850, 854, 99 L.Ed. 1231 (1955), *rehearing denied*, 76 S.Ct. 37, 350 U.S. 855, 100 L.Ed. 759 (1955). The trial court and appellate court identified the issues raised by the Petitioner and his argument that the trial court's dismissal of his complaint violated his Seventh Amendment rights is absent from their discussions of issues raised because it was raised for the very first time in his writ for certiorari. (Petition, 5). Accordingly, this constitutional argument has been waived and is not properly before this Court.

II. Certiorari is not warranted because the lower court's dismissal as a matter of law did not create any confusion or conflict in the law. The Agreement at issue was invalid under the existing law at the time the Agreement was entered into and invalid under the law at the time the Petitioner sought to enforce its terms.

Even if Petitioner had properly preserved the issue of whether or not the application of the RELA to the parties' agreement was proper, it would not merit review because no conflict, or even confusion, over the issue exists.[2] At the time the parties signed their agreement, Section 1450.195 of the Illinois Administrative Code required a written brokerage agreement to have a definite expiration date. (Pet. App. 14a). Whether the RELA should have been applied by the trial court is not a meritorious issue in light of the fact that the Illinois Administrative Code, which was in full force and effect during the relevant time

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[2] It is well-established in Illinois that the trial court may dismiss a complaint as a matter of law without violating the plaintiff's right to trial by jury when it is apparent that there are no disputed facts that would support the cause of action. *Fitzpatrick v. Pitcairn*, 371 Ill. 203, 207, 20 N.E.2d 280, 282 (Ill. 1939). Likewise, under federal standards "[n]either a summary judgment nor the direction of a verdict infringes the right to a jury trial preserved by the Seventh Amendment to the Constitution where the question is one of law." *Whitsell v. Alexander*, 229 F.2d 47, 49 (7th Cir. 1956), *citing Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320, 23 S.Ct. 120, 47 L.Ed. 194 (1902).

period, had the same requirement and Ryland argued for its application to the parties' Agreement in the lower courts, a fact which was noted by the Illinois Appellate Court. (Pet. App. 14a). The Illinois Administrative Code has the force and effect of law, and, like a statute, it is presumed valid. *People v. Selby*, 298 Ill.App.3d 605, 611, 698 N.E.2d 1102, 1107 (4th Dist. 1998). See also, *Granite City Div. of Nat. Steel Co. v. Illinois Pollution Control Board*, 155 Ill.2d 149, 164, 613 N.E.2d 719, 726 (1993) (administrative regulations, like statutes, are presumed to be valid). The validity of the Illinois Administrative Code has not been challenged by the Petitioner.

The parties' Agreement is an executory bilateral contract which was subject to the evolving laws. At the time of execution, both parties' obligations were still unfulfilled. While the validity of a contract is "generally determined under the law as it existed when the contract was made," the imposition of new law may make the original contract provision invalid under current public policy, thus unenforceable. *Schniederjon v. Krupa*, 130 Ill.App.3d 656, 660, 474 N.E.2d 805, 808-809 (5th Dist. 1985). While public policy "strongly favors freedom to contract," a sufficiently important contrary public interest will make a private agreement void. *Kim v. Citigroup, Inc.*, 368 Ill.App.3d 298, 307, 856 N.E.2d 639, 647 (1st Dist. 2006). "Contractual provisions that violate public policy expressed in statutory law are unenforceable and void," even if they were made in compliance with older law. *Crossroads Ford Truck v. Sterling Truck*,

341 Ill.App.3d 438, 445, 792 N.E.2d 488, 494 (4th Dist. 2003). When the RELA was amended to require written brokerage agreements to include a definite termination date, the Agreement was subject to that change. See *infra.* p. 6.

In any event, at the time the Agreement was signed, Section 1450.195 of the Illinois Administrative Code required written brokerage agreements to contain a definite termination date. See *infra,* p. 6. In the absence of a statutory provision to the contrary, the requirements of the Illinois Administrative Code prevail. Therefore, it is irrelevant which law applied to the parties' Agreement because it failed to comply with the Illinois Administrative Code in effect at the time it was entered into and it failed to comply with the amended RELA at the time the Petitioner sought to enforce its terms.

III. Petitioner's argument that his complaint was dismissed as a matter of law by the lower courts in violation of his right to a jury trial under the State of Illinois Constitution and the Seventh Amendment of the U.S. Constitution, is not the law and not a meritorious issue for review.

Further, the Petitioner's argument that the trial court improperly dismissed his claims in light of the fact that he had a demand for a trial by jury in violation of the State of Illinois Constitution and the Seventh Amendment of the U.S. Constitution is without merit and is not a significant issue under

Supreme Court Rule 10. U.S. Sup. Ct. Rule 10, 28 U.S.C.A. As this Court is acutely aware, the principal purpose for which certiorari jurisdiction exists is to resolve conflicts among United States Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 111 S.Ct. 1854, 1857, 500 U.S. 344, 347, 114 L.Ed.2d 385 (1991). As this Court noted in *Rice v. Sioux City Memorial Park Cemetery*, 75 S.Ct. 614, 616-617, 349 U.S. 70, 74, 99 L.Ed. 897 (1955), certiorari should not be granted except in cases involving the settlement of issues which are of importance to the public, as distinguished from that of parties, and in cases where there is a real and embarrassing conflict of opinion and authority between courts of appeals. No such conflict exists in the instant case.

The dismissal of the Petitioner's claims with prejudice by the trial court was decided as a matter of law by the lower courts pursuant to the Illinois Code of Civil Procedure for involuntary dismissal. (Pet. App. 16a, 24a). As noted previously, an Illinois trial court may dismiss a complaint as a matter of law without violating the plaintiff's right to trial by jury when it is apparent that there are no disputed facts that would support the cause of action. *Fitzpatrick*, 371 Ill. at 207, 20 N.E.2d at 282. Dismissal of a complaint as a matter of law despite the plaintiff's demand for trial by jury is entirely consistent with the federal court standards and is not a violation of the Seventh Amendment of the U.S. Constitution. "Neither a summary judgment nor the direction of a

verdict infringes the right to a jury trial preserved by the Seventh Amendment to the Constitution where the question is one of law." *Whitsell*, 229 F.2d at 49, *citing Fidelity,* 187 U.S. at 320. The Petitioner has not identified any conflict within the Illinois state courts, much less a conflict between the Illinois Code of Civil Procedure and any provision of federal law. This case does not properly raise any conflict amongst the courts or constitutional issues regarding a plaintiff's right to a jury trial that would merit this Court's review.

CONCLUSION

The Petitioner has waived the issues raised which are a denial of trial by jury under the Seventh Amendment of the U.S. Constitution and the improper application of the Illinois Real Estate Licensing Act by failing to raise those arguments in the trial court or the Illinois Appellate Court. In addition, the legal theory that the dismissal of a complaint as a matter of law wrongly deprives a plaintiff of a trial by jury is not accurate. Further, the application of the Illinois Administrative Code or an amended Illinois statute requiring an expiration term is not case dispositive since the agreement at issue was an executory bilateral contract modifiable by

evolutionary changes in the law prior to it becoming an executory contract.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

B. MICHAEL SCHNEIDER,
Plaintiff-Petitioner

v.

THE RYLAND GROUP
Defendant- Respondent

On Petition for Writ of Certiorari to the Supreme Court of Illinois

REPLY TO BRIEF IN OPPOSITION

B. Michael Schneider
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815/546-3616

I. Facts Relevant to the Brief in Opposition

Additional facts that relevant to the Brief in Opposition are that North Central College and Ryland had entered into negotiations with each other during the winter of 1996 and initiated negotiations with the Village of Bolingbrook to annex the property to the Village during 1996. This is known because of certified documentation from the Village Clerk of Bolingbrook that indicates that the Village Attorney had issued a memorandum of the rejection of the proposed annexation agreement and land plan to another attorney who is retained by the Village to represent them in development proposals. The certified document dated is dated April 15, 2007. A letter received from Ryland's Comptroller in April of 2000 indicated that the "deal" regarding the potential purchase of the property had "come to them from another broker in the summer of 1997." Of course, that was not the case since the memorandum from the Village Attorney was generated in the Spring of 1997. This means that North Central College and Ryland had initiated negotiations to conclude the transaction in 1996. The initial phase of closing on the property was not completed until September of 1998 due to reasons unknown. Plaintiff initiated an invoice in October of 1998 and Ryland's regional president did not claim that Ryland would not honor the open invoice until July of 2002, even though monthly statements were mailed to Ryland.

Ryland asserts in error that "at the time the parties executed the Agreement, Section 1450.195 of the Illinois Administrative Code 1450.195 required

written brokerage agreements to contain a definite termination date. (Pet. App. 14a)."

Ryland's citation incorrectly cites the Illinois Administrative Code in 2000. The Petition for Writ of Certiorari cites the Illinois Administrative Code that Ryland had cited in their pleadings since 2006 when the action was filed in the circuit court of Cook Co. 68 IL ADM 1450.195. The relevant part of the Illinois Administrative Code for 1996 is not available on Westlaw. It was only found most recently by request from the Illinois Supreme Court Librarian.

The Illinois Administrative Code appended to the Petition for Writ of Certiorari is for the code in 2000 (Pet. App. 14a).

Petitioner has received faxed copies from the Supreme Court Librarian of the 1996 Illinois Administrative Code relevant to Listing Agreements, Section 1450.70 and for Written Agreements, 1450.80 agreements. They are appended hereto.

The Illinois Administrative Code for 1996 does not provide for an automatically void provision to any agreement entered into between a broker and a client should it fail to declare an automatic expiration date in the agreement. (App. herewith)

The Illinois Administrative Code, is appended hereto, as it appears from the documents received by Petitioner from the Illinois Supreme Court librarian Listing Agreements Section 1450.70 (App. 43a) nor Written Agreements 1450.80 (App. 45a) has a provision that automatically voids an agreement nor Section 1450.195, Criminal Acts (App. 47 a). (1996).

Ryland has misstated the applicable law in existence in 1996 when the contract was executed.

II. Argument

Ultimately, Petitioner was unaware that the circuit court and the appellate court would rely upon law that was revised some 3 to 4 years after the agreement was executed. Petitioner filed in the appellate court motions to Recall the Mandate and to Revise the Order because the order had been based on law that was enacted years after the Buyer's Acknowledgement of Site Visit was executed. The appellate court affirmed the circuit court pursuant to Supreme Court Rule 23 (b) (3) and (4). The appellate court refused to exercise jurisdiction under Supreme Court Rule 23 (c) (1), (2), (4), (5), even though the Motion to Recall the Mandate had been properly submitted for the appellate court's consideration.

Petitioner made these facts of misapplied law known to the First District Appellate Court as well as the Illinois Supreme Court. Petitioner made the Illinois Supreme Court aware of the conflict of the application of the retroactive application of law known in the Motion for Supervisory Order that is appended to Petitioner's request for Extension of Time that was granted by Justice Stevens (App. for Ext. of Time 08A477).

Being that none of the revised laws of the Real Estate Licensing Act of 2000 provided for a retroactive provision and that the revision to the Illinois Administrative Code did not provide a retroactive provision for the changes, there is no legitimate reason for the circuit court to have applied law that did not exist at the time the contract was executed (Pet. App. 33a).

Ryland asserts that the "College" denied, "in writing" that there was any agreement with the Petitioner, the circuit court did not find that the "letters" from North Central's personnel persuasive enough to merit an involuntary dismissal based on a contradictory exhibit attached to the complaint (Pet. App. 22a-31a). This is due to the fact that there was no language in the letters that actually denied the existence of an agreement with the Petitioner.

Moreover, phone records attached to the complaint as exhibits, showed that Petitioner had tried to phone Ryland all through 1996 and 1997 without any return calls from Ryland.

Petitioner did not "waive" the provisions of the Real Estate Licensing Act as the common law record shows that he had pled in his Sur-Reply to Ryland's Motion to Dismiss that RELA distinguished the differences of application of the law when there was the involvement of the broker's performance of a ministerial act involved (See, also, the exhibit attached to the Petitioner's Application for Extension of Time to file a Petition for Writ of Certiorari, 08 A477, the Motion for Supervisory Order to the Illinois Supreme Court that was denied). Therein is included the transcript from the hearing on the Motion to Dismiss wherein Plaintiff continually explains to the circuit court that the Buyer's Acknowledgement of Site Visit was a ministerial act. The statute states that ministerial acts may not be construed to be a brokerage agreement, 225 ILCS 455/38.25 (b), (Pet. App. 38a).

Ryland argues that the complaint was dismissed as a matter of law, but this claim is belied by the law as it existed in 1996.

Law in effect at the time the contract was executed did not allow for an involuntary dismissal based on a provision that any contract not containing an automatic expiration date was "void" for having failed to include such a provision.

The only provision for an automatic void of a contract that was in full force and effect in January of 1996 when the contract was executed was 225 ILCS 455/19 (Pet. App. 35a). That section provided that only a "listing contract" required an automatic expiration date.

Because a listing agreement is between a seller of property and a broker, and the Buyer's Acknowledgement of Site Visit is between Ryland, a buyer and Schneider, a broker, there is no valid basis in law for the circuit court's declaration that the contract was void as the law in 1996 did not require an automatic expiration date to be included.

Despite Ryland's insistence that Plaintiff "waived" his right to a trial by jury, the record shows that the lack of legitimate authority to render any findings on the disputed issue of whether the Buyer's Acknowledgment of Site Visit was a written brokerage agreement or merely a document memorializing a broker's performance of a ministerial act in exchange for an indemnification agreement was an issue of disputed material fact that was to be determined by a jury. Thus, there was no waiver as alleged.

Conclusion

Only written listing agreements that did not contain an automatic expiration date were void as a matter of law at the time the contract was executed, 225 ILCS 455/19 (Pet. App. 35a).

The Illinois Administrative Code Section 1450.195, Criminal Acts (1996) states nothing relative to a void brokerage agreement. The Illinois Administrative Code, Sections 1450. 70 Listing Agreements and 1450.80 Written Agreements do not provide that a brokerage agreement is void for failure to contain an automatic expiration date.

The revised law under the Illinois Administrative Code and the Reql Estate Licensing Act of 2000 does not provide for the retroactive application of changes to contracts that had been entered prior to the applicability of the changes to the law.

Petitioner requests that the Petition for the Writ be granted.

Respectfully submitted,

B. Michael Schneider
126 Inner Ct.
New Lenox, Il. 60451
815/546-3616

ILLINOIS ADMINISTRATIVE CODE
TITLE 68, CHAPTER VIII,

SECTION 1450.70 LISTING AGREEMENTS

a) All written listing agreements shall contain the following"

1) the list price;

2) the agreed basis or amount of commission and the time of payment;

3) the duration of the contract, clearly set forth;

4) the name of the broker and seller;

5) identification fo the property involved (address or legal description); and

6) signatures of the parties.

b) Pursuant to Section 19 of the Act, no licensee shall obtain any written listing agreement containing a clause automatically extending the listing period.

c) Every written listing shall provide that no amendment or alterations in the terms, with respect to the amount of commission shall be valid or binding unless made in writing and signed by the parties. No licensee shall use Sale Contract forms that change previously agreed commission payment terms unless seller and listing agent agree to such changes in a written memorandum separate from the Sale Contract. Any such Sale Contract forms may state that a commission is to be paid to a named licensee pursuant to a separate agreement.

d) If the terms of the listing agreement are such that seller may not receive the earnest money deposit, in the event of purshaser's default, a statement to this effect shall appear in the listing agreement, in letters larger than those generally used in the listing agreement.

e) Each listing agreement shall clearly state that it is illegal for either the owner or the broker to refuse to display or sell to any person because of their race, color, religion, national origin, sex, handicap, or familial status.

f) Each listing agreement for a residential property of four units or less, which provides for a protection period subsequent to its termination date, shall also provide that no commission or fee will be due and owing pursuant to the terms of the listing agreement if, during the protection period, a valid, written listing agreement is entered into with another licensed real estate broker.

g) A broker may discuss a possible future listing agreement with a seller whose property is listed with another broker only under the following conditions:

1) when the seller initiates the contract; or

2) when the listing broker upon request fails to provide within 10 calendar days the type and expiration date of the listing agreement between the seller and the listing broker.

The request and response shall be in writing and mailed return receipt requested. If the above information is not received within 14 calendar days, the broker may then contact the seller only if this information cannot be obtained from another source of shared broker information.
(Source Amended at 15 Ill. Reg. 10416, effective July 1, 1991)

Section 1450.80 Written Agreements

a) No licensee shall solicit, accept or execute any contract or other document relating to a real estate transaction which shall contain any blanks to be filled in after signing or initialing such contract or other document.

b) No licensee shall make any addition to, deletion from or alteration of any signed contract or other document relating to a real estate transaction without the written telefax or telegraphic consent or direction from all signatories. No licensee shall process any contract or other document that has been altered after being signed, unless each addition, deletion or alteration is signed or intialed by all signatories at the time of such addition, deletion or alteration.

c) A true copy of the original or corrected contract or other document relating to a real estate transaction shall be hand delivered or mailed within 24 hours of the time of signing or initialing such original or correction to the person signing or initialing any such contract or other document.

d) All forms used by licensees intended to become binding real estate contracts shall clearly state this in the heading in large bold type. No licensee shall use a form designated Offer to Purchase when it is intended that such form shall be a binding real estate contract.

(Source; Amended at 15 Ill. Reg 10416, effective July 1, 1991)

SECTION 1450.195 Penalties for Criminal Acts

The criminal acts referred to in the Real Estate License Act of 1983, Section 22, as misdemeanors bear the following penalties:

	Individuals	
	Class C (1st Offense)	Class A (2nd Offense)
Fine not to exceed	$500	$1000
Imprisonment not To exceed	30 days	1 year

	Corporations Business Offense	
	(1st Offense)	(2nd Offense)
Fine not to Exceed	$2000	$5000

(Source: Added at 9 Ill. Reg. 341, effective January 3, 1985)

FN: a) The above provisions are available from the Illinois Secretary of State, 217.782-7017, Springfield, Il. (For certified copies)

b) The Illinois Supreme Court Librarian, Ray Collins provided the foregoing pursuant to Petitioner's request on June 7, 2009. This is available from his office at 217/782-7596. (For faxed copies)